

TO: Public Records Subcommittee
FROM: Bert Robinson
DATE: November 14, 2007
SUBJECT: Litigation/Bid/Budget

This memo will serve as a continuation of the memo dated Oct. 31, 2007, on the drafts and personnel exemptions. In this memo I will address the exemption for litigation material, and also discuss the language in the Milpitas and San Francisco ordinances regarding budget and bid documents.

Litigation Materials

The law: 6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

The problem: The obvious purpose of this exemption is to protect the city's position in a legal proceeding. Clearly, the city should not have to disclose information to an adverse party that would undermine its negotiating posture. However, as is the case in the drafts and personnel areas, the language in this exemption can be read broadly – and, as a result, applied to documents that do not need to be shielded to achieve the exemption's purpose. For instance, many pre-existing, clearly public documents may become part of the legal proceeding. In addition, the city and the adverse party may communicate in writing during the course of the proceeding. Those documents usually require no exemption from disclosure, since they are already in the possession of both sides. However, proposed settlement documents are exempt from disclosure under the Evidence code.

The approaches: Milpitas and San Francisco take identical approaches to this issue, declaring three classes of litigation materials to be public records. They are:

- a.) A pre-litigation claim against the city. These claims are a required precursor to most lawsuits against a public agency. They sketch the details of the claim and request some form of relief.
- b.) Documents received or created by the city that were not subject to attorney-client privilege at the time they were received or created. This language is meant to address pre-existing public documents that may get wrapped up in the legal proceeding.
- c.) Communications between the city and the adverse party, including the terms of any settlement. The Milpitas/SF language makes these communications public at the time the legal matter is settled. The model ordinance calls for them to become public immediately, even as the litigation is ongoing.

In my experience, San Jose has released documents that fit into these three categories. The City Attorney's Office confirms that San Jose sees no particular problem in disclosing these sorts of documents.

One additional issue: San Francisco and Milpitas include an additional requirement in their sections on litigation materials, although it does not deal directly with a concern that arises from the CPRA. These two cities require the city attorney's office to release any advice, opinion or analysis concerning open government issues. This means that any general guidance from the city attorney's office on the city's Sunshine law would be explicitly public. It also means that if a council member were to ask the city attorney whether a particular document could be withheld under the Sunshine Law, the city attorney's response to that council member would have to be released publicly. The theory behind these requirements is that the public has a right to know what the city itself is doing to support or undermine its open government laws. Further, advocates believe the openness requirements would have a deterrent effect, discouraging the city from taking positions that could be interpreted as adverse to open government.

When I spoke to attorneys in San Francisco, they expressed concerns that this requirement, while well-intentioned, makes it difficult for them to provide candid legal advice to the Board of Supervisors – and, in fact, discourages the Board of Supervisors from seeking their advice. The San Jose City Attorney is also concerned about preserving the attorney-client privilege for communications explicitly seeking legal advice.

Contracts, bids and proposals

The problem: The California Public Records Act does not include language targeted specifically to contracts, bids or proposals. However, because these processes – and particularly competitive bid and proposal processes – include confidentiality requirements designed to ensure that the process remains fair to all bidders and proposers, it is not always clear what becomes public and when. Several years ago, San Jose went through an extensive review of its procurement processes to, among other things, regulate possible conflicts of interest and discourage improper contacts between proposers and city officials. However, the procedures that emerged from that review did not include specific provisions relating to public records.

As a side note, bid documents are most often sought from the city by losing bidders, not by journalists or other members of the public.

The approaches: The San Francisco and Milpitas ordinances, as well as the model ordinance, make public three types of documents:

- a.) All proposals made by contractors to the city, including bids and responses to requests for proposals or qualifications (RFPs or RFQs).
- b.) Any city evaluation of a contractor's proposal.
- c.) All communication between the city and those seeking contracts.

The ordinances apply to the full range of situations in which the city may enter into a contract with a private firm, including competitive bids and RFPs as well as deals that may not be reached on a competitive basis, such as lease agreements, franchise agreements, design-build contracts and sole-source contracts.

San Francisco and Milpitas make these documents public at the time the contract is awarded. The model ordinance suggests they should be public 15 days in advance of any award of a contract. Another possibility would be to make them public at the time the city staff makes its recommendation to the council for the award of the contract.

In addition, the San Francisco and Milpitas ordinances require each City department to provide to the City Council and make public a list of all sole source contracts entered into each fiscal year.